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Marxism and the Social Theory of Law

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MARXIST THEORY OF law remains relatively undeveloped in comparison with Marxist critiques of political economy. One reason is that Marx himself never returned to the project he set himself in his youth: to complement his critique of political economy with a critique of jurisprudence.[1] There are asides in Marx's scientific works, the *Grundrisse* and *Capital*, where he raises juridical issues of right and law and provides clues as to how the method of his critique of political economy might be transposed to the field of jurisprudence.[2] There are political texts in which Marx reveals something of his practical approach to questions of law,[3] and there are texts by Engels in which he summarises his and Marx's approaches.[4] This said, there is no possibility of discovering a *theory* of law and legal relations ready-made in Marx's works.

Learning from Marx is also made more difficult by equivocations in Marx's own analysis of law. In some texts Marx appears to offer a negative criticism of legal rights, presenting them as mere forms without substantive content, and an antinomian view of communism as a political order superseding all juridical and constitutional limits. In other passages Marx shows an appreciation of the value and durability of legal forms whose contradictions he analyses without normative preconception of what ought to replace them. In his scientific works there is no clear-cut answer to the question of what constitutes a 'positive supersession' of modern law, as opposed to its merely 'abstract negation'.[5] Even in early texts like *On the Jewish Question*, where Marx at first sight appears unequivocally critical of civil rights as icons of egoism and separation, the thrust of his

[1] Marx wrote: 'I shall therefore publish the critique of law, morals, politics, etc. in a series of separate independent pamphlets and finally attempt in a special work to present them once again as a connected whole, to show the relationship between the parts . . .' (preface to the 'Economic and Philosophical Manuscripts', in L. Colletti (ed.) *Karl Marx: Early Writings* (Harmondsworth Penguin 1992) at 281.

[2] See B. Fine, *Democracy and the Rule Of Law: Liberal Ideals and Marxist Critiques* (London Pluto 1995), ch. 4 'Law, state and capital'.

[3] See M. Cain and A. Hunt, *Marx and Engels on Law* (London Academic Press 1979); A. Hunt, 'Marxism, law, legal theory and jurisprudence' in P. Fitzpatrick (ed.) *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London Pluto 1991).

[4] F. Engels, *Anti-Dühring* (London Lawrence and Wishart 1943).

[5] The terms are drawn from Marx 'Economic and Philosophic Manuscripts of 1844' in R. Tucker, (ed.) *The Marx-Engels Reader* (New York Norton 1978).

work was to defend the rights of Jews against a form of radicalism which declared that Jews ought not to be granted political emancipation unless and until they abandoned their Judaism.[6] Perhaps the one thing we can say about Marx's conception of modern legality is that he never abandoned the desire to look more closely into the matter. Often critics of Marx have displayed a rather crude and stereotyped view of what Marx wrote about jurisprudence, and there is no denying that some forms of Marxism, especially those connected with the state power of Stalin and his successors, have lived up to these images. But to identify Marx as a precursor of a totalitarian destruction of law, as many critics do, would be no less of a travesty than to identify any of the other great nineteenth and early twentieth century rebels against tradition: be it Hegel or Nietzsche or even Weber.[7]

One thing which makes Marx's great works, the *Grundrisse* and *Capital*, into 'classics' is that, when we actually read them, we find original and unexpected elements that surpass all our previous conceptions of what they contained and that force us to question the images we have of them. The texts themselves never seem to exhaust what they have to say to us and the common use of terms like 'Marxist' always seems inadequate in relation to what we read. To discover what animated Marx and what makes him significant for our own times, we need to shake off what Italo Calvino has called 'the pulviscular cloud of critical discourse' which so often surrounds his works.[8] For me, the key to understanding Marx's critique of jurisprudence is to see that his task was not to posit communism as an abstract ideal built on the ruins of law, redeeming past injuries and violence through the prospect of future reconciliation, but rather to resist all forms of historicism, dispel all teleologies of progress, in short, to criticise all claims to perfect harmony which conceal real social antagonisms beneath sanctified juridical categories.

The contribution of Marxism to our understanding of law lies in its determination to uncover the social relations expressed, mediated and obscured in legal categories such as private property or state property, constitutional government or the workers' state, representative government or the general will, individual right or collective right. Here the name of Marxism indicates a commitment to a *social* theory of law: one which investigates why and with what consequence definite social relations assume determinate legal forms. Conversely, the contemporary repudiation of Marxism may signify a move away not just from socialism but from any idea of the social. In opposition to natural law theory and legal positivism, Marxism is a declaration that the idea

[6] In this text Marx rejected the spurious reasoning of certain young Hegelians that Jews were only concerned with the acquisition of money, lacked any wider sense of national loyalty and were therefore undeserving of political rights. His basic argument was that modern society as a whole is a money society in which self-interest usually trumps wider social concerns, so why pick on the Jews? See Marx, 'On the Jewish Question' in Colletti, *Karl Marx: Early Writings*, *supra* n. 1.

[7] See H. Arendt, *Between Past and Future* (Harmondsworth Penguin 1977) at 26–27.

[8] I. Calvino, *Why read the classics*, trans. Martin McLaughlin (London Jonathan Cape 1999) at 6.

of right is not a natural or rational attribute of individuals, nor is it merely a product of sovereign legislation, but a social form of the subject which emerges under given historical conditions. In this sense, Marxism does not make an 'ism' of the social in the sense that it stands for the abolition of legal forms in the name of social transparency, but rather traces the immanent development of the forms and shapes of law—from the simplest forms of abstract right to the most complex and concrete forms of state and international law—as a flexible and radically incomplete system open at every point to political action. Marxism names the perception that if there is one thing worse than the idealisation of law and its absolution from critical inquiry, it is hatred of law even when, or perhaps especially when, that hatred is expressed in the name of 'the people'.

1. MARX'S CRITIQUE OF RIGHT

Marx's most important insights into law are to be found in his marginal comments on the idea of 'right' in works focusing on the critique of economic forms.[9] In these asides Marx argued that the kind of society which gives rise to the commodity form, money relations and capital also gives rise to modern forms of right, law and state. They are two sides of the same coin. His argument may be reconstructed thus. In a society based on production by *independent* producers, whose contact with one another is mediated through the exchange of products, producers are *free* to produce what and how much they wish, *equal* in that no producer can force others to produce or expropriate their products against their will, and *self-interested* in that they are entitled to pursue their own private interests. Relations with other producers take the form of free and equal exchanges in which individuals alienate their own property in return for the property of another for the *mutual benefit* of each party. Exchange relations make no reference to the circumstances in which individuals seek to exchange nor to the characteristics of the commodities offered for exchange. They appear as self-sufficient relations, divorced from any particular mode of production and enjoyed by free and equal property owners who enter a *voluntary contract* in pursuit of their own mutual self-interests.[10] The parties to the exchange must

[9] See J. D. Balbus 'Commodity form and legal form' (1977) 2 *Law and Society Review* at 571–588; G. Kay and J. Mott, *Political Order and the Law of Labour* (London Macmillan 1982); D. Sayer, *The Violence of Abstraction: Analytical Foundations of Historical Materialism* (Oxford Blackwell 1987).

[10] In an exchange relation, Marx writes, 'each confronts the other as owner of the object of the other's need, this proves that each of them reaches beyond his own particular need . . . as a human being and that they relate to each other as human beings . . . there enters in addition to the quality of equality, that of freedom. Although individual A feels a need for the commodity of individual B, he does not appropriate it by force, nor vice versa, but rather they recognise one another reciprocally as proprietors, as persons whose will penetrates their commodities. Accordingly, the juridical moment of the *Person* enters here . . . all inherent contradictions of bourgeois society appear extinguished . . . and bourgeois democracy even more than the bourgeois economists takes refuge in this aspect'. Marx, *Grundrisse*, *supra* n. 10, (Harmondsworth Penguin 1973) at 243 and 251.

place themselves in relation to one another as *persons* whose will resides in those objects and must behave in such a way that each does not appropriate the commodity of the other and alienate his own, except through an act to which both parties consent.[11] The presupposition of exchange, however, is an organisation of production which *forces* producers to exchange their products. Their *interdependence* means that they cannot survive except by exchanging the products of their labour. Both the form of their relations, that of a contract between two private parties based on the exchange of property, and the content, the terms on which such contracts are made, are beyond the will of individuals and become a power over them. Individuals are *formally* independent but the relations they enter, far from being an abolition of relations of dependency, are rather the 'dissolution of these relations in a general form . . . *Individuals are now ruled by abstractions*, whereas earlier they depended upon one another'.[12]

The illusion of a free and equal relationship is dissolved once we explore the *content* of exchange. Where commodity production is sporadic or peripheral and exchange takes the form of an occasional barter between communities, the terms of the exchange are determined by the producers themselves and each party has a right to defend its property by force of arms. With the generalisation of commodity production, competition between producers ensures that commodities exchange at or around their values, according to the socially necessary labour time that enters their production. Since there is no guarantee that the actual labour-time taken by the producer corresponds with socially necessary labour-time for the goods in question, equal right in these circumstances entails that some producers exchange their commodities for more than their value and some for less. This leads to extremes of impoverishment and enrichment, but if one party grows impoverished and the other grows wealthier, then this is, as it were, of their own free will. Under these circumstances producers are forced to be free, that is, to observe the rules governing the exchange of commodities.

Relations between capitalists and wage-labourers continue to take the form of free and equal exchanges, but the form and content of these exchanges now change.[13] On the surface the relation between capitalist and worker remains a simple exchange, but it is distinguished by the entry into the market of a new commodity, labour-power, whose historical presupposition lies in the double

[11] Marx writes: 'The sphere of circulation of commodity exchange, within whose boundaries the sale and purchase of labour power goes on, is in fact a very Eden of the innate rights of man. It is the exclusive realm of Freedom, Equality, Property and Bentham. Freedom because both buyer and seller of a commodity, let us say labour-power, are determined only by their own free will . . . Equality because each enters into relations with the other as with a simple owner of commodities and they exchange equivalent with equivalent. Property because each disposes only what is his own. And Bentham because each looks only to his own advantage. The only force bringing them together is the selfishness, the gain and the private interest of each'. Marx, *Capital* 1, *supra* n. 11 at 280.

[12] Marx, *Grundrisse*, *supra* n. 10, at 164.

[13] Marx writes: 'a worker who buys a loaf of bread and a millionaire who does the same appear in this act as simple buyers . . . all other aspects are extinguished . . . the content of these purchases appears as completely irrelevant compared with the formal aspect' (Marx, *Grundrisse*, *supra* n. 10, at 251).

freedom of individuals—their freedom to own their own body, mind and capacity to work, and their freedom from other means of subsistence or production than their labour-power. The buyer of labour-power is no longer a simple buyer who wishes to use it as an object of personal consumption but a capitalist who uses it specifically for the production of surplus value. The secret behind the exchange between capital and labour is that workers receive in the form of wages a value equivalent to the value of their labour-power (ie the labour time socially necessary for the reproduction of the labourer) and not equivalent to the value of the products they produce on behalf of the capitalist. In this context, the unequal appropriation of unpaid surplus labour becomes the *substance* of equal right.

Turning to the reproduction of capitalist society, Marx argues that the social content of the exchange between capital and labour changes once more. Looked at individually, the exchange between capital and labour consists of the expropriation of part of the product of the workers' labour by the capitalist. The capitalist says that the capital which he exchanges with labour-power is his own property—perhaps because he worked hard for it or because it is the product of his own earlier labour. This may be true of primitive accumulation but ignores the role of violence and international pillage. In any event after several cycles of production the entire capital owned by the capitalist will consist only of capitalised surplus value, that is, of the product of the labour of workers expropriated by the capitalist and turned into capital. It is now revealed that the exchange between capital and labour is no exchange at all, since the total capital is but a transmuted form of the expropriated product of workers from a previous period. On the surface, free and equal exchange carries on as before. Beneath the surface there is the appropriation of the property of one class by another without equivalent.[14] The law which presupposes that we own the products of our labour 'turns . . . through a necessary dialectic into an absolute divorce of property and appropriation of alien labour without exchange'.[15] Marx's argument reaches its climax in the conclusion that *in this context* abstract right becomes a 'mere semblance', a 'mere form . . . alien to the content of the transaction', a 'mystification', 'only a semblance and a deceptive semblance'.[16]

Perhaps the most original proposition in this account of Marx's social theory of right is that the social relations of production which give rise to the commodity or value form of the products of human labour also give rise to the right

[14] Marx writes: 'Originally, the rights of property seemed to us to be grounded in man's own labour . . . Now, however, property turns out to be the right on the part of the capitalist to appropriate the unpaid labour of others or its product and the impossibility of the worker of appropriating his own product. The separation of property from labour thus becomes the necessary consequence of a law that apparently originated in their identity'. (Marx, *Capital* 1, *supra* n. 11, at 729)

[15] Marx, *Grundrisse*, *supra* n. 10, at 514.

[16] Marx, *Capital* 1, *supra* n. 11 at 729–730.

or person-form of the producers. Both economic and juridical categories, as well as the split between them, appear as the results of certain social relations of production. We might say that Marx's theory of *modernity* is a theory of the separation of subject and object, person and thing, right and value. Yet the difficulty Engels alluded to, that he and Marx 'neglected the formal side of political, juridical and other ideological notions—the way in which these notions come about—for the sake of their inner content', was not addressed.[17] For all the sophistication of the analysis, we are left with the presentation of right as a mere form, a semblance, an empty illusion, a *mirror* of economic relations. While the forms of value are understood as *real* appearances, the forms of right are caught within a *logic of illusion* from which it seems that Marx did not escape. Yet if the surface form of a thing is as real as its social content, as Marx recognised in his analysis of the value form, there is no reason to think that the appearance of a subject—as a person, a possessor of right, a human being—is not also as real as its social content.

In short, Marx left a rich but incomplete legacy of juridical criticism. The task of developing his critique of jurisprudence was left for others to fulfil. It has not proven easy.

2. SPLITS WITHIN MARXISM AND THEIR EFFECTS ON LEGAL THEORY

With the historical split of Marxism into Social Democratic and Bolshevic wings, Marxist legal theory was also torn apart. On the revolutionary side, the writings of the Soviet legal theorist, Evgeni Pashukanis, represented an important attempt in the 1920s to apply the method of Marx's critique of political economy to jurisprudence.[18] Pashukanis was one of the first to draw upon the systematic connections Marx observed between the commodity and the juridical subject, and on this basis generated a commodity form theory of law in opposition to both legal formalism, which abstracts the legal form from social relations, and to legal reductionism which ignores legal form in favour of an analysis of political interests or economic functions. Pashukanis argued that law is a determinate social form, signifying relations of mutual competition between juridical subjects who affirm their private rights against one another and are otherwise indifferent to the needs of others. He argued that law arose in the modern bourgeois era, was indelibly marked by its origins, and would wither away under socialism.

Pashukanis' commodity form theory of law represented an important step forward in recovering Marx's critique of right, but the result of his investigations

[17] Engels, 'Letter to Mehring', 1893, in Marx and Engels, *Letters on Capital*, trans. by E. Drummond (London New Park 1983).

[18] E. Pashukanis, *Law and Marxism* (ed. and introduction by C. Arthur) (London Pluto 1983); E. Pashukanis, *Selected Writings on Marxism and Law* (ed. and introduction by P. Beirne and R. Sharlet) (London Academic Press 1980).

was a one-sided critique of law as a power which operates on the basis of atomistic social relations between juridical subjects. His disinterest in rights and freedoms played into the hands of the evolving Stalinist regime and his thesis concerning the withering away of law under socialism served to justify the Soviet regime's disregard for legal procedure. Like many intellectuals Pashukanis was useful for a totalitarian movement in its period of ascendancy, but once the Stalinist regime sought to legitimise terror legally, as it did in the 1936 constitution, then Pashukanis and his work were soon dispatched. A productive reconstruction of Pashukanis' theory was attempted in the 1970s by New Left critics of law in an attempt to revive the revolutionary tradition of Marxist legal criticism, but the theoretical and political limitations of his work have become increasingly apparent.[19]

On the other side of the Marxist divide, Social Democratic legal theorists like Karl Renner in Austria were not interested in overcoming the legal form but in actualising it and giving it a socialist content. For Renner, legality is like a bottle in which different social contents can be poured. The stronger version of his argument is that it is *only* under socialism that the rule of law can be realised since under capitalism law is corrupted by private interests. The transition to socialism is taken to mean the extension of legal regulation into previously considered private spheres—through legislation on health and safety, minimum wages, trade union rights, unemployment benefits, the nationalisation of privately owned services, etc.—and the democratisation of legislative representation and procedure.[20] This idea of the progressive socialisation of law was buried under the weight of aggravated class conflicts and then of totalitarian forces, but perhaps its main internal weakness was a failure to recognise the justified revulsion that can arise at the gulf between legal ideals and the sea of human misery to which they fail to respond—a revulsion which totalitarian movements were quick to exploit. When Social Democracy re-surfaced after the war, its legal theory became largely independent of Marxist underpinning.

A more direct confrontation with the rise of fascism and Stalinism in the 1930s was to be found among Critical Theorists of the Frankfurt School. They sought to rehabilitate Marx's critique of law by reconsidering it in relation to the tradition of natural law and by contrasting it with the destructive hatred of law expressed in totalitarian movements and with the ideas of 'people', 'leader', 'nation', 'blood' and 'soil' found in National Socialist ideology. They argued, for example, that Hegel and Nazism were impossible bed-fellows, since the

[19] See, for example, C. Arthur, 'Toward a materialist theory of law' (1976–7) 7 *Critique*; P. Binns 'Law and Marxism' (1980) 10 *Capital and Class*; B. Fine, *Democracy and the Rule of Law*, *supra* n. 2 at 155–169; Alan Norrie 'Between structure and difference: law's relationality' in M. Archer et al. (eds) *Critical Realism: Essential Readings* (London Routledge 1998), 19XX; R. Sharlet, 'Pashukanis and the withering away of law in USSR' in S. Fitzpatrick (ed.) *Cultural Revolution in Russia 1928–31* (Indiana University Press 1974); R. Warrington, 'Pashukanis and the commodity form theory', (1981) 9 *International Journal of the Sociology of Law*.

[20] K. Renner, *The Institutions of Private Law and their Functions* (RKP 1949).

claims of a philosopher who stood for legality, individual rights and a bureaucracy based on rational and calculable norms conflicted with the ethnic claims of the Nazi movement. By contrast, they argued that Marx's critique of Hegel's *Philosophy of Right* both rejected its authoritarian tendencies and revealed that this philosophical authoritarianism mirrored the political proclivity of contemporary liberalism, faced with increasing class inequalities and conflicts, to turn the state into an independent power. According to Herbert Marcuse, Hegel had no choice but to betray his philosophy of freedom since he conceived the system of right as a closed ontological system identical with the end of history.[21] Marx by contrast moved beyond Hegel's 'abstract, logical, speculative expression of the movement of history' and rediscovered the 'possibility and truth' immanent within the modern state: that humankind can become the conscious subject of its own development. Marcuse saw Marx as developing an historical materialism which would foster new forms of individualism beyond abstract right, new forms of association beyond civil society, new forms of regulation beyond law, and new forms of self-determination beyond the state.

Franz Neumann endorsed Marx's critique of Hegel's *Philosophy of Right*, describing the latter as an 'inexcusable paean' to the Prussian state, 'the state of broken promises' and interpreted this as a defence of rational law against both revolutionism and legalism.[22] Neumann argued that Marxism can explain the decline of rational law as the result of the transition from competitive to monopoly stages of capitalism. Rational law was necessary for the predictability of market exchanges in a competitive capitalist economy but less needed by monopoly capital for which planning and control substitute for free exchange. If the major social functions of law are to secure the dominance of capital, make economic processes calculable, and guarantee the individual a minimum of freedom, the decline of the first two functions still left the third intact. While capital lost interest in maintaining rational law (fascism being one expression of this), the defence of rational law was all the more necessary for labour. Neumann sought to integrate Marx and Weber by linking Weber's opposition to the introduction

[21] H. Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (Boston Beacon Press, 1979) at 294–315. For a critical assessment of this way of reading Hegel, see R. Fine, *Political Investigations: Hegel Marx Arendt* (London Routledge 2001), ch. 1.

[22] Social Democracy's reliance on the constitution which no longer had real guarantees behind it, had the ambiguous effect of legalising class struggles and allowing a hostile judiciary to determine their outcomes. See F. Neumann, *The Democratic and Authoritarian State* (London Macmillan 1957); *The Rule of Law* (Oxford Berg 1986); *Behemoth: The Structure and Practice of National Socialism* (London Gollanz 1942). See also O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton Princeton University Press 1961) and *Politics, Law and Social Change: Selected Essays of Otto Kirchheimer* (ed. F. Burin and K. Shell) (New York Columbia University Press 1969); W. Scheuerman (ed.) *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley University of California Press 1996); M. Salter 'The visibility of the Holocaust: Franz Neumann and the Nuremberg trials' in R. Fine and C. Turner (eds) *Social Theory after the Holocaust* (Liverpool University Press 2000); William Scheuerman *Between the Norms and the Exception: the Frankfurt School and the Rule of Law* (Cambridge Mass. MIT Press 1994).

of substantive legal principles to Marx's analysis of the changing character of capital. His conclusion was not to surrender to doctrines which divorce justice from legality, but to fuse the idea of socialism with that of rational law, while supporting the use of extra-legal methods to defend legality. Arguing that rational law by its very nature must possess certain formal qualities of generality, specificity, non-retroactivity, etc. and must contain certain substantive freedoms of speech, movement, religion and association, Neumann attacked tendencies to subordinate *ratio* to the *voluntas* of state sovereignty. While totalitarian movements turned law into a means of exercising arbitrariness and terror, Marxism could not be blind to the fact that rational law was not merely a 'lesser evil' but a genuine repository of democratic values.

3. THE POST-WAR RESURGENCE OF MARXIST CRITICISM

A resurgence of Marxist criticism of law took off in the latter half of the 1950s, gathered strength with the rise of the New Left in the 1960s and became linked to new social movements in the 1970s. This critique was diverse but it shared a more or less anti-authoritarian radicalism directed East at the party-state, West at cold war militarism and everywhere at imperial domination. It was driven by a sense of profound disillusionment at the gulf between what law ought to be and what it actually is. One expression of this feeling was to be found in the then influential works of Louis Althusser, Nicos Poulantzas and their admirers who formed the school of *structural Marxism*. They focused on the manifold functions which law plays in the reproduction of capitalist relations of production, including functions of repression and violence, the legitimation of the existing order, organisation of the dominant classes, fragmentation of the subordinate classes, de-politicisation of social movements, institutionalisation of class relations, individuation of collective struggles, etc. Marxism combined at first with sociological structural functionalism and then with the more radical post-structuralism of Michel Foucault.[23]

In *State, Socialism, Power* Poulantzas argued that in the modern political order law *appears* as a limitation on the violence of the state, but this appearance gives rise to an *illusory* opposition between law and terror—illusory because the bloodiest of empires have historically been founded on constituent

[23] In his essay 'Ideology and Ideological state apparatuses (notes toward an investigation)' Althusser located law within the repressive and ideological superstructure of the state, determined in the last instance by the economic base and functioning to secure the reproduction of capitalist relations of production [Althusser, *Lenin and Philosophy and Other Essays* (London Monthly Review Press 1971) at 134–158]. In *Fascism and Dictatorship* (London NLB 1974) N. Poulantzas modified this functionalist account of law, arguing that law perpetuates and sanctions class rule by regulating political power through a system of general, formal, abstract norms, and by imposing limits on the exercise of state power. While he denied that the fascist or totalitarian state is the antithesis of the liberal state, he also argued that in the former arbitrariness reigns and law is no longer the limit of power, at 320–322.

rules and because the alliance of law and terror furnished by Stalin's 1936 constitution was paraded as the most democratic in the world. Poulantzas opined that 'nothing could be more mistaken than to counterpose the rule of law to arbitrariness, abuse of power and the prince's act of will' and that such a vision corresponded to a 'juridical-legalistic view of the state'. It was allegedly mistaken because the modern state 'holds a monopoly of violence and ultimate terror' and law is 'an integral part of the repressive order' which 'organises the conditions for physical repression'.[24] Poulantzas granted that direct violence is not practised within the core capitalist societies as much as it once was and attributed this in part to the functions law plays in constituting individuals as juridical subjects. Since law fragments and individualises the ruled, cements the social formation under the aegis of the rulers, and organises the apparatuses of administrative and judicial power, the direct employment of violence is no longer so urgently required. Poulantzas insisted, however, that the connection between law and terror is not severed, even when law 'organises and sanctions certain *real rights* of the dominated classes' and even when formal liberties are secured as 'conquests of the popular masses'.[25] There was a certain equivocation in this critique of law—whether emphasis was put on the determination of law in the last instance by economic forces or on the relative autonomy of law—and part of its appeal was predicated on its ideological flexibility. It provided a conceptual framework in which legal processes could be examined for their effects on the wider social order—albeit from a top-down, functionalist standpoint.

Under the title of *state-derivation* and *capital-state* theories, some contemporary Marxists have focused on the place of law in the dynamics of capital accumulation in a less functional mode.[26] They recognise that class relations should be seen as relations of production in a wider sense than economic determinism allows and that capitalist relations of production necessarily present themselves in mediated forms that are at once economic and juridical. They re-read Marx's critique of capital not only as a theory of the exploitation of labour by capital but as a theory of capitalist society as a whole, including the juridical forms in which class relations between labour and capital are reproduced.[27] The

[24] N. Poulantzas, *State, Power, Socialism* (London Verso 1980) at 76.

[25] Poulantzas, *ibid.*, *Socialism* at 92.

[26] See J. Holloway and S. Picciotto (eds) *State and Capital* (London Edward Arnold 1978); W. Bonefeld 'Social constitution and the form of the capitalist state', *Open Marxism* volume 1, W. Bonefeld, R. Gunn, K. Psychopedis (eds) (London Pluto 1992) at 93–132; R. Gunn 'Marxism and mediation', (1987) 2 *Common Sense*; R. Gunn 'Rights' (1987) 77 *Edinburgh Review*; M. Postone *Time, Labour and Social Domination: a re-interpretation of Marx's critical theory* (Cambridge CUP 1996).

[27] A flavour of the state-derivation approach may be had from Bonefeld's comments on the social constitution of the capitalist state: 'the relation of the state to society' implies that 'private individuals exist as abstract individuals endowed with standardised rights and as such treated as abstract citizens. This treatment complements politically the processing of class as wage labour. This re-assertion of the right of property denies the existence of class . . . The formal safeguarding of rights inverts into the substantive guarantee of exploitation . . . The mode of existence of the state . . . in

problem of the isolation of law from productive relations is addressed by seeing capital not merely as an economic category but as a more general principle of explanation. Their core proposition is that in a capitalist society the commodity is not only the general form of the product but the fundamental social form that structures social life as a whole—including the state, law, rights and even legal philosophy.

A perhaps more radical critique of the structuralist approach came from Marxists who focused on popular struggles from the bottom up and gave themselves the name of *Marxist humanism*. Their critique was directed at a 'Marxism' which considered human beings merely as units in a chain of determined circumstances and which denied the creative agency of human beings. It was this denial that the Marxist historian, Edward Thompson, called a 'heresy against man' and associated both with official Communism and structural Marxism. Workers are not mere 'bearers of capitalist relations of production', he wrote, and 'contrary to the view of some theoretical practitioners, no worker known to historians ever had surplus value taken out of his hide without finding some way of fighting back'.[28] Thompson's approach to law was brimming with 'bloody-minded distrust' of power and dismissive of an authoritarian legalism which equates law with the will of government. He urged Marxists to recover their moral imagination from the numbing language of party-speak which had also entered into academe. Thompson emphasised the *social* character of Marx's critique of political economy, but argued that even Marx was trapped within the circuits of capital and only partly sprung that trap in *Capital*. While Marx could not be blamed for the deformations of Marxism, Thompson acknowledged that there was no 'virgin untouchable purity of original Marxism to which Stalinism owes no kinship'.[29]

Thompson rejected a model of modern society which forcibly isolates law as part of the superstructure from the economic relations which make up the base, and the 'age-old academic procedures of isolation which are abjectly disintegrative of the enterprise of historical materialism, the understanding of the full historical process'. Referring to his own eighteenth century historical studies, he wrote:

terms of law . . . eliminat[es] social conflict in and through the instantiation of human rights, that is, law and order control . . . The legalisation . . . of social relations implies at the same time their stratification . . . which aims at the development of the social relations of production in politically supervised, legally controlled, non-conflictual forms . . . the content of which is the perpetuation of the slavery of labour . . . The attempt of the state (and capital) to harness class conflict into bourgeois forms of legality . . . implies not only the legalisation of social relations . . . it denies the existence of the working class as class . . . The historical composition of the state during fascism cannot be seen as an 'exceptional' form of state . . . Rather the coercive character of the state exists as presupposition, premise and result of the social reproduction of the class antagonism . . .' (Bonefeld, *Open Marxism*, *supra* n. 26 at 116–120).

[28] E. Thompson, 'Poverty of Theory' in *The Poverty of Theory and Other Essays* (London Merlin 1978) at 345.

[29] Cited in R. Fine 'The rule of law and Muggletonian Marxism: the perplexities of Edward Thompson' (1994) 21 *Journal of Law and Society* at 197.

> I found that law did not keep politely to a 'level' but was at *every* bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights, definitions of agrarian practice) . . . it contributed to the self-identity both of rulers and of ruled; it afforded an arena for class struggle within which alternative notions of law were fought out.[30]

Class relations are at once legal, political and cultural as well as economic, so that if the base-superstructure metaphor is to be retained at all, it should be recognised that the base is not economic but social—human relationships involuntarily entered into in productive processes. The problem with orthodox Marxism is that it inverts the spirit of Marx's critique of capitalist society: instead of confronting the inhumanity of a society which preaches economic determinism, it postulated economic determinism as its own doctrine.

Thompson's approach to law was driven by the conviction that capitalist society offers an inhuman form of political community and that this inhumanity was mirrored in existing socialist states. This conviction led him along a variety of theoretical and empirical paths at different stages of his writing. In his historical writings he sought to recapture the moral community of eighteenth century plebeian movements committed to upholding traditional use rights against modern laws of private property, seeing them as 'a last desperate effort of the people to re-impose the older moral economy as against the economy of the free market'.[31] In other writings Thompson defended the rule of law as an 'unqualified human good' and as a crucial 'inhibition on power'.[32] He thought it essential for Marxism to put its own house in order: this meant above all abandoning its dismissal of law as a mere instrument of class rule. He commented with some acerbity on how in the twentieth century even the most exalted thinker ought to be able to tell the difference between a state based on the rule of law and one based on arbitrary, extra-legal authority, and he attacked the essentialism of Marxist critiques of law which substituted a platonic notion of the true, ideal capitalist state for actual capitalist states, and turned law into no more than a confirmation of existing property relations. Law should be seen rather as a *mediation* which imposes effective inhibitions on power and defends the citizen from power's all-inclusive claims. In yet other phases of his journey Thompson looked for inspiration to the antinomian communities of love upheld by certain radical Protestant sects in opposition to the violence of law. This attitude was expressed in his Spring 1968 lecture at Columbia University when he declared himself a 'Muggletonian Marxist'. The Muggletonians were a Protestant sect which maintained that Legality or the 'Moral Law', as exemplified in the Ten Commandments, is a code of repression and that its prohibitions are not binding on Christians committed to the Gospel of Forgiveness,

[30] Thompson, 'Poverty of Theory' *supra* n. 28 at 286–8.
[31] E. P. Thompson, *The Making of the English Working Class* (Harmondsworth, Penguin 1986) at 73.
[32] E. P. Thompson, *Whigs and Hunters* 'The rule of law' (London Penguin 1990) at 268.

Love and Mercy. Law may discover sin but it cannot remove it, for 'it changeth not the heart' and its principle is 'envy'. The Gospel of Love was to usher in the New Jerusalem after the fall of Rome. Where God lives in the heart, laws are relegated to mere ordinances. Thompson saw in this antinomian tradition a challenge to 'the authority of the ruling ideology and the cultural hegemony of Church, Schools, Law and even of "common-sense" Morality'.[33] Taken as a whole, the strength of Thompson's alliance of Marxism and humanism was to face up to the burden of history without proclaiming the innocence of Marxism, to hear the voices of the oppressed in all their inconsistency, and to address historically the equivocations of law.[34] Perhaps the main limitation of his approach is that, despite itself, it too sometimes ended up dissociating law from productive relations and treating law and economics as belonging to distinct or even opposed logics.

The dissociation of law from productive relations has been the unresolved thematic of contemporary Marxism. The central contention of Critical Theory, that the commodity form should be seen as the structuring principle of capitalist society as a whole, including its legal aspects, may be traced back to Lukács' judgement in *History and Class Consciousness* that the chapter in *Capital* dealing with the fetish character of the commodity 'contains within itself the whole of historical materialism', that at this stage in the history of humankind 'there is no problem that does not ultimately lead back to that question', that 'there is no solution that could not be found in the solution to the riddle of the commodity structure'.[35] Lukács presented the commodity as the *universal category* which determines the world in all its dimensions, and proceeded from the notion that workers can only become conscious of their actual existence in capitalist society when they become aware of themselves as commodities, not as individual bearers of rights. He treated the possession of 'right' as in essence a right over things: an expression of the instrumental domination of 'man' over 'nature'.

We might say that Marxist theory has followed the difficult path between Lukács and Thompson, that is, between the association of law with and its dissociation from commodity relations. Most Marxists tend to present their own particular resolutions as a recovery of the authentic Marx from traditional Marxism, but the important part of Marx's argument (at least after 1848) is that the modern *subject* is neither a commodity nor a human being in the abstract, but an owner of commodities, a possessor of at least his or her labour power, and in this respect a subject of right, a person, a human being in the substantial sense of the term. For Marx, this quality of personality marks the beginning of the long

[33] E. Thompson, *Witness against the beast: William Blake and the moral law* (Cambridge Cambridge University Press 1993) at 5, 19 and 225.
[34] I discuss empirically the equivocations of law in Bob Fine and Robert Millar (eds) *Policing the Miners' Strike* (London Lawrence and Wishart 1985); and R. Fine, Francine de Clercq and Duncan Innes 'Trade Unions and the State in South Africa' (1981) 15 *Capital and Class* at 79–114.
[35] G. Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (London Merlin 1971) at 83 and 170.

and arduous journey in the development of self-consciousness which takes producers beyond their status merely as workers to their human emancipation.

4. MARXIST LEGAL THEORY TODAY

As I write this paper in 2001, confronted with the difficult task of comprehending new forms of terror and counter-terror, there is no denying that Marxism is a marginal force in contemporary legal criticism. I do not intend to investigate the reasons for this decline but only to say that in its various shapes Marxism has been a rich source of social theorising about law and that it would be premature to announce its death. Behind the will to declare it dead, we may find a rightful desire to construct a relation to law that has no kinship with totalitarianism, but the rejection of Marxism not only mis-identifies the origins of totalitarianism, it may also express a deeper distrust of *social* theory—whether from the standpoint of natural right or legal positivism or a continuous deconstruction that goes beyond law's social underpinnings to an elusive moment of alterity and justice.

Marxist legal theory has not resolved the difficulties it has encountered in its efforts to understand the relations that hold between law and society. One such difficulty has been the proclivity of Marxists to construct this or that 'ism'—be it functionalism or instrumentalism or humanism or formalism or critical realism—as the royal road to the truth of law. There is nothing wrong in exploring, say, the functions of law for capital accumulation, or the social interests and backgrounds of those who enforce the law, or popular conceptions of law held by the labouring classes, or the inhibitions on economic and political power imposed by the law, or the connections that tie the form of law to that of the commodity, or indeed the immaturity expressed when individuals relate to one another exclusively on the basis of their rights. There is every reason to examine these issues and the strength of Marxism has been to take up the social questions that others have neglected. The weakness of Marxists, however, has been to turn their particular concern into an exclusive concern and denounce the concerns of others. Perhaps it is time to abandon the 'ism' of Marxism itself, whose unity is in any event illusory, and see Marx alongside the great nineteenth century critics of tradition as one source of critical thinking among others.

Today there is a new engagement of Marxists with legal theory. It has taken off in numerous sites and from numerous standpoints. It has attached itself to the struggle for a democracy in which human rights have pride of place. And from very different standpoints it has immersed itself in reading legal texts. For example, in *Toward a New Common Sense* Boaventura de Sousa Santos explores the plurality of legal forms as a basis for his critique of the dominant positivistic and natural law traditions in Western legal thought. He identifies different forms of law relating to different structural sites—the household, the workplace, the marketplace, the community, the citizenplace, the worldplace

and argues that by prioritising the citizenplace over all other sites, Western legal thought loses sight of the connections which constitute the whole. Defining the citizenplace as 'the set of social relations that constitute the "public sphere", the vertical political obligation between citizens and the state', de Sousa Santos acknowledges that in the core capitalist societies it tends to be a place of formal legal freedoms and democratic procedures.[36] However, he argues that the restriction of democratic rights to this single site 'allowed for the shifting of the global emancipatory promises of modernity to the promise of state democratisation'—a far narrower ambition which left despotic forms of *social* power in other sites unhindered and obscured. According to the broader conception of social or human emancipation which de Sousa Santos identifies with Rousseau and Marx—a conception involving the affirmation of *social* equality and the delegitimation of class differences—we must raise the question of links between the functioning of law in the citizenplace and the forms of social power exercised in other sites. He speaks of *interlaw* to express a sense of the connectedness of the whole, the incompatibility of capitalism with the radical democratic claims of modernity, and an expanded, ultimately anti-capitalist conception of human rights to embrace the forgotten spheres of the social.[37]

To take another example, in *Empire* and other writings Michael Hardt and Antonio Negri argue that the social constitutions of the late modern period were founded on a recognition of labour and premised on a conflictual model of political life whose juridical expression was that of legal realism: a theory of law which holds that those who command over society secure their hegemony by means of law in such a way that the law is continually modified, open to conflict and reformed in line with changes in social life. According to Negri, the presupposition of legal realism is that law is a living part of the superstructure, but he argues that this has now imploded. The increasing integration of the economic and the legal has radically transformed this context of constitutional reference. A revolution from above has destroyed not only the pre-existing structures of social democracy but also the working class as one of the subjects of this relationship. It has resulted in what Negri calls, following Foucault, a 'biopolitical' model of disciplinary arrangements that differs from that outlined by Foucault only in that it is now marked by the 'imperial hierarchies' of a global system. For Negri the impact of this social revolution from above on legal studies is not only to render legal realism redundant, but also those open, anti-authoritarian Marxist tendencies whose beliefs in a strong reformism and in the alternative

[36] B. de Sousa Santos, *Towards a New Common Sense : Law, Science and Politics in the Paradigmatic Transition* (London Routledge 1995) at 421.

[37] This approach has led to the criticism from within the Marxist tradition that notwithstanding his radicalism de Sousa Santos does not penetrate the law of the citizenplace itself, nor question its positivistic self-understanding, nor acknowledge the forces of denial, suppression, conflict and confrontation which operate *within*. Alan Norrie argues that de Sousa Santos's pluralistic conception of sites of law lacks 'structural depth' and does not enable us to understand the articulation of structures which constitute these sites as a capitalist totality. See A. Norrie, 'Between structure and difference', *Critical Realism*, *supra* n. 19 at 729–30.

uses of law were predicated on a social and political situation which is now ended. For Negri, the postmodern claim that the dynamics of law and the dialectic of enlightenment are over, is basically correct. There is no outside—no other place from which to base the overcoming of what is now going to rack and ruin. Negri attaches Marxism to the conceptual framework of post-structuralism to argue that in contemporary capitalism law has lost whatever normative autonomy it might once have possessed. It has become identical with the regulated and disciplined sphere of the social.

In this new social situation Negri maintains that the subject of change is no longer the working class but the multiplicity of immaterial workers (defined by their plasticity), intellectuals, temporary labourers, female workers, immigrant workers, etc. He calls them a 'multiplicity' (a term drawn from Spinoza) to express the manifold desires that set them in opposition to capitalist biopower, and argues that this multiplicity no longer mediates its activity through the democratic system of political representation, a system which no longer works at any level, but through a plurality of movements and sites of struggle, against a plurality of forms of exploitation and oppression, according to a plurality of ideas of life and freedom. The challenge Negri poses to lawyers and politicians is the construction of a new 'constitution of liberty'—one which no longer starts from the enigma of political representation and no longer separates politics from the whole of social life, but recognises the right of all citizens to a social wage adequate for their reproduction, legitimates the exercise of counter-power, guarantees the right of mobility and welcomes foreigners. Marxism is linked here both to the post-structuralism of Foucault, Deleuze and Guatarri, and to a radicalised struggle for universal human rights outside the conventional system of democratic representation. Not for nothing is Negri sometimes presented as an organic intellectual of the anti-capitalist movement.[38]

These radicalised views of the struggle for human rights constitute a rich strand in contemporary Marxism. Many other critical writers have re-assessed relations between Marxism and the law. Notably, Jürgen Habermas has addressed what he sees as the intimate connections linking the legal rights championed within modern natural law and the radical democracy championed within Marxism;[39] and the rise of new forms of global justice and cosmopolitan

[38] This account is drawn from M. Hardt and A. Negri, *Labor of Dionysus: A Critique of the State Form* (Minneapolis University of Minnesota Press 1994) and from 'Postmodern global governance and the critical legal project' (paper presented at the Critical Legal Conference, University of Kent, September, 2001). Criticism of this paper has focused on the possible inconsistency of the denouncement of law in the first half and the re-affirmation of constitution and human rights in the second. If Franz Neumann was right in claiming that all law contains objective and subjective dimensions—those of regulation, authority and sovereignty on one side and rights, freedoms and agency on the other—Negri splits this unity in claiming that in the present law has become purely objective and that in the future it can become purely subjective.

[39] J. Habermas, *Between Facts and Norms* (Cambridge Polity 1997); J. Habermas, *The Inclusion of the Other* (Cambridge Mass. MIT Press 1997); R. Fine, 'Kant's theory of cosmopolitan right and Hegel's critique', *Philosophy and Social Criticism*, 2002, forthcoming.

right designed to arrest the new forms of terror and atrocity with which the modern world has become acquainted in the last century. Some are addressing the problematique of legal regulation of international business in a context of globalised capital accumulation.[40] Some have sought to develop the more directly social rather than political aspects of Marxist legal theory, in particular by relating it to feminist social critiques of law.[41] Some, like myself, have been re-examining the relation between Marx and the classical tradition of jurisprudence, including Hegel's undervalued critique of the forms of right in his *Philosophy of Right* and its connections with Marx's critique of the forms of value in *Capital*.[42] The legacy of Marx is alive in all these investigations, but it is increasingly difficult to demarcate the boundaries of what Marxism is and is not. In recompense, we now have a rich engagement between social theories of law and legal philosophy which promises much for the future.

[40] See, for example, S. Picciotto and J. McCahery (eds) *Corporate control and accountability: changing structures and dynamics* (Oxford Clarendon Press 1993).

[41] This line of inquiry was developed early on by Catharine MacKinnon in *Toward a feminist theory of the state* (Cambridge Mass. Harvard University Press 1989) and in *Feminism unmodified: discourses on life and law* (Cambridge Mass. Harvard University Press 1987).

[42] R. Fine, *Political Investigations, supra* n. 21; A. Wood 'Hegel and Marxism', in Frederick Beiser (ed.) *The Cambridge Companion to Hegel* (Cambridge CUP 1993); A. Warminski, 'Hegel/Marx: Consciousness and Life' in Stuart Barnett (ed.) *Hegel after Derrida* (London Routledge 1998); G. Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge Cambridge University Press 1996); D. MacGregor, *Hegel and Marx: after the fall of communism* (Cardiff University of Wales Press 1998); I. Fraser, 'Two of a kind: Hegel, Marx, dialectic and form', (1997) 61 *Capital and Class* at 81–106.